

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Geographic Partitioning and Spectrum)
Disaggregation by Commercial Mobile)
Radio Services Licensees)

WT Docket No. 96-148

COMMENTS OF OMNIPOINT CORPORATION

Mark J. Tauber
Mark J. O'Connor

Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

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Summary

Omnipoint supports the Commission's geographic partitioning and spectrum disaggregation proposals. Flexible partitioning and disaggregation rules would make it easier for small businesses and disadvantaged groups to enter the PCS marketplace and encourage faster deployment of advanced wireless communications networks. Flexible partitioning and disaggregation also would promote the efficient use of spectrum.

The Commission does not need to adopt significant changes to its other regulations in conjunction with its partitioning and disaggregation proposals. The NPRM's approach would create no significant incentive to engage in anticompetitive behavior; in fact, the Commission should go beyond the NPRM proposals to provide an even wider range of partitioning and disaggregation options. Omnipoint proposes that the Commission allow partitioning and disaggregation of licensed spectrum into geographic areas and amounts of bandwidth smaller than the minimum thresholds outlined in the NPRM in order to maximize efficiency and flexibility, and to be technology neutral given that different PCS protocols require different minimum incremental units of spectrum. With respect to repayment, current rules are sufficient to prevent unjust enrichment. In addition, the Commission should avoid imposing more stringent build-out requirements on partitioned licenses.

Finally, Omnipoint proposes that, consistent with geographic partitioning and spectrum disaggregation, the Commission permit all PCS operators, including Entrepreneurs, to engage in post-auction swaps of equal amounts of spectrum within a particular market especially as a means of helping address adjacent channel interference issues.

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Introduction

Omnipoint Corporation, by its attorneys, files these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹

Omnipoint strongly supports the Commission's geographic partitioning and spectrum disaggregation proposals. Flexible geographic partitioning and spectrum disaggregation rules would make it easier for small businesses to enter the PCS market, create opportunities for members of disadvantaged groups such as minorities and women, and encourage faster deployment of advanced wireless communications networks in sparsely populated areas. Equally important, the Commission's proposed approach can serve these goals while reducing the need for regulation and promoting the efficient use of spectrum.

Omnipoint believes that the Commission can and should adopt a flexible approach to partitioning and disaggregation without making significant changes to its construction

¹ In the Matter of Geographic Partitioning and Disaggregation by Commercial Mobile Radio Services Licensees, Notice of Proposed Rulemaking, FCC 96-287 (July 15, 1996) ("NPRM").

requirements, repayment rules, and other regulations. Indeed, flexibility in this area would pose little danger of encouraging anticompetitive behavior or related abuses, and the Commission should consider going beyond the proposals outlined in the NPRM to provide an even wider range of partitioning and disaggregation options. PCS licensees, their competitors and customers, and the public would all benefit from maximum flexibility.

I. The Flexible Partitioning And Disaggregation Rules Proposed by the Commission Would Encourage Diversity And Competition

The partitioning and disaggregation proposals contained in the NPRM would create additional opportunities for small businesses, disadvantaged groups, niche services, and rural wireless providers, because they would make it practical to serve smaller and less densely populated areas and to offer specialized services. As the Commission correctly observes, "allowing [minorities and women] to acquire partitioned licenses may facilitate their ability to participate in the provision of broadband PCS"² by reducing the amount of capital necessary to enter the business. Likewise, "the creation of smaller, less capital-intensive licenses that are within the reach of smaller entities"³ would lower barriers to entry for entrepreneurs. The same principle applies to disaggregation, because small or disadvantaged entities are more likely to be able to finance the acquisition of smaller increments of spectrum than an entire 30 or 10 MHz license. Additionally, companies operating in rural areas that may not meet the definition of "rural telephone company" could negotiate to serve their communities with PCS licensees that are focusing on larger metropolitan areas.

² NPRM at ¶ 6.

³ NPRM at ¶ 11.

By itself, the potential for increased diversity of ownership in the PCS industry is a compelling argument in favor of partitioning and disaggregation,⁴ but the benefits to consumers are just as convincing. As the Commission recently found in considering what types of services CMRS licensees should be allowed to offer, "the public interest . . . [is] served by giving licensees maximum flexibility in the uses of . . . spectrum."⁵ The Commission has reached the same conclusion in a number of other proceedings, and it has adopted several rule changes designed to give wireless licensees more flexibility in the services they are allowed to offer.⁶ The Commission has recognized that a flexible spectrum use policy stimulates competition, encourages innovative services, and broadens the range of choices available to consumers.⁷

That proposition is no less true in the context of partitioning and disaggregation. The Commission has long envisioned the development of a broad variety of PCS offerings, including

⁴ See 47 U.S.C. §309(j)(4) (establishing diversity of ownership as statutory goal).

⁵ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-6, FCC 96-283 (Aug. 1, 1996) ("Fixed Wireless R&O"). "[A]llowing all types of . . . services will allow CMRS providers to better respond to market demand and increase competition in the provision of telecommunications services." Id.

⁶ Fixed Wireless R&O at ¶ 9 (noting trend toward liberalization); see, e.g., Allocation of Spectrum Below 5 GHz from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624, 672 (1995) (authorizing use of reallocated band for mobile, fixed, and combined services); Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Fixed Television Service, MM Docket No. 94-131, Report and Order, 10 FCC Rcd 9589, 9619 (1995) ("MDS R&O") (authorizing use of MDS spectrum for any kind of communications service on common carrier or non-common carrier basis).

⁷ Fixed Wireless R&O at ¶¶ 3, 58.

services that compete directly with wireline technologies,⁸ and as the NPRM recognizes, "[p]ersonal communications requirements are changing rapidly as our society becomes more mobile and the demand for near instantaneous communications and universal access increases."⁹ Additionally, technological changes are likely to influence the amount and type of spectrum necessary to provide wireless services. For example, PCS licensees currently employ several different air interface technologies (e.g., GSM, IS-661, TDMA, CDMA) that each require different channelization. As technology develops and as consumer demand evolves, use of the CMRS spectrum will likewise change to meet the market. The Commission correctly perceives that added flexibility may be necessary for new services to become competitive and for first-generation PCS services to grow and flourish.¹⁰

A flexible approach that allows the market to determine how spectrum is divided by bandwidth and geography is most consistent with the intent of Congress as expressed in the Telecommunications Act of 1996 ("the 1996 Act"),¹¹ which was designed to foster competition and remove barriers to innovation in the communications industry.¹² In sum, the NPRM's proposed partitioning and disaggregation rules would reinforce the efforts of the Commission

⁸ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676, 5681 at ¶ 10 (1992).

⁹ NPRM at ¶ 40.

¹⁰ NPRM at ¶ 14.

¹¹ Pub. L. No. 104-104, §§ 251-261 (removing barriers to competition).

¹² See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (discussing purposes of 1996 Act); see also Fixed Wireless R&O at ¶ 23 (noting 1996 Act's goal was to "make available the most competitive environment possible for communications services").

and Congress to encourage a wide range of companies to develop and offer a variety of services in the PCS marketplace, and the public would undoubtedly benefit.

II. The Potential for Abuses Of Flexible Partitioning and Disaggregation Policies Can Be Eliminated with Minor Modifications to the Proposed and Existing Rules

In the past, the Commission has taken a conservative approach to partitioning and disaggregation largely because of concerns that more liberalized rules would allow licensees to circumvent the Commission's system build-out requirements, stockpile spectrum in order to keep competitors out of the market, or reap unjust financial benefits from trafficking in licenses. Omnipoint believes that, in the context of spectrum disaggregation and geographic partitioning as proposed in the NPRM, these concerns are somewhat misplaced. The principles embodied in the Commission's existing build-out, spectrum cap, and unjust enrichment rules are sufficient to prevent abuses.¹³ As a general matter, geographic partitioning and spectrum disaggregation alone does not necessitate more stringent regulatory burdens on CMRS licensees. In light of this principle, the NPRM's approach is generally sound. Some parts of the proposal, though, appear to add requirements that are not necessary to protect the public interest and which, in fact, could impede efficient post-auction market allocations.

A. The Construction Requirements Should Remain the Same Regardless of Partitioning

¹³ Indeed, the Commission has amended its rules to allow partitioning and disaggregation in a number of services. See, e.g., MDS R&O at 9614-15, ¶¶ 46, 47; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 624, 646-48, ¶¶ 51-56 (1995); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Notice of Proposed Rulemaking, 11 FCC Rcd 3108, 3135-36, ¶¶ 136-38 (1996).

Omnipoint believes that the build-out requirements for a given MTA or BTA license area should be no more stringent than the Commission's current build-out rules, 47 C.F.R. § 24.203(a)&(b); the fact that a license is partitioned should not result in an implicit increase in the amount of build-out required under federal law.

Under the Commission's proposed build-out requirement for partitioned licenses, however, the parties must agree at the time of their partitioning/assignment application to abide by one of two build-out options: (1) the initial licensee (the "partitioner") and the assignee (the "partitionee") each assume independent obligations to fulfill the construction requirements as applied to their partitioned service areas,¹⁴ or, (2) the partitioner, having met its five-year build-out obligation, certifies that it will meet the ten-year construction requirement applicable to the entire area covered by the original license, and, the partitionee/disaggregatee meets the substantial service requirement at the end of the ten-year term of the initial license.¹⁵

Omnipoint recommends that the Commission retain the first part and modify the second part of the proposed test. Specifically, the parties should be able to opt for a requirement that the partitioner will meet both the five-year and the ten-year build-out requirement for the entire initial license area. Under this slightly relaxed version of the Commission's proposed test, service would be delivered to at least as much of the population as would have been required absent the partitioning or disaggregation. Consumers would be no worse off than under the rules applicable if the licensed had not been partitioned, and, because the partitionee is likely to purchase the spectrum to provide additional service, consumers will have more service options in the long run as a result of the partition. By contrast, imposing additional, more stringent build-out requirements simply because of a partitioning may discourage assignments of underserved

14 NPRM at ¶ 33.

15 NPRM at ¶ 34.

territory, especially late in the license term. The build-out requirements for PCS have been set for several years, and the Commission should avoid implicit changes in those requirements.

B. The Repayment Rules Currently In Place Can Be Adapted To Prevent Unjust Enrichment

Omnipoint proposes that an entity obtaining either a partitioned license or disaggregated spectrum from an existing licensee should be free to negotiate payment terms with a minimum of government oversight. Unjust enrichment concerns do not apply to post-auction transactions of non-entrepreneur band spectrum and the Commission's assignment process should not impose artificial constraints on the parties. The principles underlying the existing entrepreneur-band rules can be readily applied to the partitioning and disaggregation of entrepreneur-band spectrum.

Specifically, the Commission should clarify that spectrum disaggregation and geographic partitioning of a Block A, B, D, or E PCS licenses do not raise unjust enrichment issues. The Commission should not require the expenditure of public or private resources or compel public disclosure of competition-sensitive information concerning the financial arrangements between an assignor and an assignee when non-entrepreneur band licenses are involved.¹⁶ Moreover, with Block A, B, D, and E licenses, the government has received its auction fees up-front, and thus the assignment does not threaten "recovery for the public of a portion of the value of the public spectrum."¹⁷

Where the CMRS license involves a set-aside, installment financing or bidding credits, such as the broadband PCS Block C or F licenses, then the principles of the Commission's

¹⁶ Existing rules that require disclosure of private contracts serve no public purpose and should be eliminated. Cf. 47 C.F.R. § 1.2111(a) (disclosure of contracts and consideration for transfer or assignment of license required for first three years after initial license grant, even if not an entrepreneur-band license).

¹⁷ 47 U.S.C. §309(j)(3)(C).

transfer restrictions and unjust enrichment rules should continue to apply. Specifically, the existing Block C or F transfer restrictions¹⁸ and the existing unjust enrichment rules¹⁹ should continue to apply to partitioning or disaggregation of entrepreneur-band licenses.²⁰

Obviously, however, the amount of the unjust enrichment penalty should reflect the ratable portion of the total licensed spectrum that is disaggregated or the geographic area partitioned. Omnipoint recommends that the Commission add to the two unjust enrichment rules to provide that : (1) for spectrum disaggregation, the amount of the unjust enrichment should be based on the proportion of Block C or F spectrum disaggregated in relation to the total spectrum of the initial license (30 MHz or 10 MHz),²¹ and (2) for geographic partitioning, the amount of unjust enrichment should be based on the proportion of the population in the partitioned area in relation to the total population in the initial BTA license.²² In the case of a combination of geographic partitioning and spectrum disaggregation, the Commission could simply use a MHZ-pops calculation and apply that proportion to any unjust enrichment penalty.

¹⁸ 47 C.F.R. §24.839(d); Report and Order, WT Dkt. No. 96-59, GN Dkt. No. 90-314, FCC 96-278, at ¶¶ 83-85 (rel. June 24, 1996).

¹⁹ 47 C.F.R. §1.2111(b)-(d).

²⁰ As discussed in Part IV, below, Omnipoint's proposal for entrepreneur spectrum swapping does not implicate the unjust enrichment provisions.

²¹ For example, if an entrepreneur, but non-small business obtains 10 MHz of a Block C license from a small business auction winner, the unjust enrichment penalties should be equal to one-third of the penalties that would have resulted if the entire license had been transferred.

²² For example, if an entrepreneur, but non-small business obtains 25% of the total pops in a Block C license from a small business auction winner, the unjust enrichment penalties should be equal to one-quarter of the penalties that would have resulted if the entire license had been transferred.

III. The Commission Should Allow Additional Flexibility In Partitioning And Disaggregation

While the NPRM's approach is constructive, Omnipoint believes that the Commission could safely broaden the range of proposed partitioning and disaggregation options by allowing the division of licenses into smaller geographic units and portions of bandwidth. The NPRM's concern about the administrative workability of unrestricted partitioning and disaggregation are valid, but somewhat more flexibility could optimize the efficiencies of partitioning and disaggregation without creating significant administrative burdens.

A. Operators Should Be Allowed To Geographically Partition Their Licenses Into Areas Smaller Than Counties

Omnipoint proposes that the Commission re-evaluate its minimum size limit for partitioning, and allow many different geographic units such as municipal borders or industrial zones, in addition to county lines. The NPRM's proposed county-based limit would sacrifice a substantial measure of market flexibility, because some counties are extremely large and have widely varying land use patterns, population densities, and demographic characteristics. Moreover, a county-based rule would seemingly disadvantage PCS operators in the western United States for no public purpose. For example, there are seven BTAs in Arizona and five BTAs in New Mexico that include only one county -- Block C, D, E, and F licensees will not be able to partition in those areas. While some large counties are sparsely populated throughout, others have significant concentrations of populations living in geographically separated areas, such as San Bernadino County, CA. The county-based partitioning requirement also arbitrarily disfavors counties with large populations. For example, Los Angeles County would not be eligible for partitioning although it has a larger population than at least *42 of the 50 states in the U.S.*

In addition, many potential partitionees, whether industrial complexes or cable television systems, have contiguous franchise or service areas that are based on smaller areas, such as industrial zones, city or municipality lines or, in some cases, even portions of counties. As an

example, while the Commission has recognized the potential economies to be gained from cable-based PCS services, the partitioning rules should permit PCS operators to partition licenses in a manner that reflects a cable system's service area, which is very often smaller than the entire county. In order to gain the full benefits of a market-based division of service areas, the Commission should permit partitioning along any cognizable geographic unit, i.e, town, city, industrial zone, village, franchise area, etc.

While Omnipoint understands that the Commission must define the parameters of each licensee's territories, geographic partitioning negotiated among the parties without artificial restrictions placed by federal regulations would maximize efficient use of spectrum. If necessary, the Commission could require the parties, as part of the assignment process, to provide the Commission with a detailed map of the partitioned areas, in both electronic²³ and hard-copy format.

B. Licensees Should Be Allowed To Disaggregate Spectrum In Smaller Amounts

The Commission should allow the maximum degree of disaggregation that can be readily administered. Apart from the potential for new opportunities noted previously, disaggregation would encourage efficiency by providing licensees with a way to divest themselves of spectrum they are unable to use for the services they provide and to acquire additional increments of spectrum that their technology and customers may require. The 1MHz threshold suggested by the NPRM, however, is likely to leave significant amounts of spectrum unused, because PCS technologies do not operate within such "round" amounts of bandwidth. Additionally, some services will not require paired frequencies, or they may use a disproportionate amount of spectrum on a single channel, leaving unused capacity in the other half of the pair. In other

²³ To facilitate public inspection and the Commission's own enforcement needs, a public database of the geographic contours of each license could be established.

words, different technologies or service applications require different channelizations and bandwidths. While the Commission might find it easiest to keep track of disaggregated PCS spectrum in paired 1 MHz increments, this policy would put some technologies at a disadvantage relative to others and leave inefficiencies that might well otherwise be corrected by market forces. We note that none of the current four mobile PCS technologies are divisible evenly into one MHz units, and they range from as little as 60 KHz to 2.5 MHz. For example, there is no reason to prevent two parties from splitting a 10 MHz license into 6.4 and 3.6 MHz Blocks. Further, the guard bands necessary between different PCS networks vary depending on the PCS technologies that are adjacent to one another and so the unit of divisibility should be as small and as flexible as possible.

Omnipoint proposes that in order to minimize involuntary warehousing of spectrum and avoid inadvertent bias in favor of certain technologies and against others, licensees should be allowed to disaggregate any portions of spectrum agreed to by the parties. The potential for unwieldy degrees of aggregation is not great, because the initial licensee and the assignee both have an interest in maintaining functional and workable portions of bandwidth. This practical consideration would keep reasonable limits on the division of spectrum while minimizing potential unfairness and waste, and it might also create additional opportunities for niche services to use leftover spectrum.

IV. Entrepreneurs Should Be Allowed To "Swap" Spectrum With Licensees

The NPRM's proposals to allow A, B, D, and E block licensees to partition their licenses to eligible entities at any time²⁴ and to give C and F block licensees limited authority to partition²⁵ are helpful, but they should be extended. The C and F block partitioning limits are

²⁴ NPRM at 3.

²⁵ NPRM at 4.

slightly more conservative than necessary, because the proposed partitioning would not allow "swaps" for equivalent amounts of spectrum and territory between entrepreneurs and non-entrepreneurs. For example, under the NPRM's proposal, a Block B licensee would be prevented from partitioning a portion of its license to the Block C licensee in return for the Block C spectrum; or, a Block F licensee would be restricted from exchanging its license with the Block F licensee or for a partitioned and disaggregated 10 MHz BTA license from the Block A licensee. Omnipoint sees no reason to forbid these kinds of transactions.

The C and F blocks were established to create opportunities for small and entrepreneurial companies and to ensure diversity of ownership in the PCS industry *at the time of auctioning*, but the Block C BTA spectrum (1895-1910, 1975-90 MHz) or the Block F BTA spectrum (1890-95, 1970-75 MHz) do not hold any intended technical characteristics specific to entrepreneurs. Once the auctions are completed, the public policy purposes of the set-aside are in no way diminished if an entrepreneur with a 10 MHz F Block license is permitted to swap it for the 10 MHz D Block license. The benefits and requirements of the entrepreneur's rules should attach to the entrepreneurial entity rather than the specific frequency. Spectrum swaps for the same licensed area would permit PCS licensees to negotiate with other license holders in the market to avoid adjacent channel interference issues. For example, a Block B licensee and an independent Block F licensee may each find that it would be better for both to share a contiguous spectrum border, and the Block E licensee may be indifferent or may be willing to be paid to move to the Block F spectrum. Under this scenario, all licensees in the market are better off and the parties mutually avoid interference issues that can arise under the current market conditions with deployment of multiple incompatible technologies. More efficient arrangement of the licensees along the spectrum would also lead to quicker introduction of PCS services, at lower costs to small business and the consumer.

Unfortunately, the current PCS rules, and even the suggested partitioning and spectrum aggregation rules, would prohibit such post-auction market corrections because the restriction on

transfers currently applies to the specific *spectrum* rather than to the *entrepreneurial entity*. Omnipoint's spectrum swapping proposal does not in any way implicate unjust enrichment. Under this proposal, the entrepreneur retains the same amount of spectrum over the same licensed territory as it won in the auction. Unlike situations where a small business simply sells its spectrum to a large company and earns a margin on the basis of the Commission's discounts for small businesses, no small business licensee would be cashing out of the market. Instead, spectrum swapping would permit all licensees in a given market, including small business licensees, to resolve interference and other technical issues privately, without resort to the Commission's dispute processes.

Conclusion

Flexible partitioning and disaggregation of PCS licenses and spectrum would serve the public interest by increasing the diversity of ownership in the industry and making it feasible to provide a wider range of services to consumers. Omnipoint generally supports the NPRM's proposals and encourages the Commission to go further in opening up new possibilities for both service providers and consumers in the PCS marketplace.

Respectfully submitted,

OMNIPOINT CORPORATION

By:



Mark J. Tauber

Mark J. O'Connor

Piper & Marbury L.L.P.
1200 19th Street, N.W.
Seventh Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

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